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In the Supreme Court of the United States

OCTOBER TERM, 1969

FRANK SARELLI,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

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To: *The Chief Justice and the Associate Justices of the Supreme Court of the United States:*

Petitioner, Frank Sarelli, respectfully prays that a Writ of Certiorari issue to review the judgment of the Appellate Court of Illinois, First District, which affirmed a judgment of the Criminal Division of the Circuit Court of Cook County, Illinois, convicting him of possession of marijuana in violation of State statutes.

OPINION BELOW

The opinion of the Appellate Court of Illinois, First District, is reported in 105 Ill. App. 2d 167, 245 N.E. 2d 49, and is reprinted herein as Appendix A.

JURISDICTION

The judgment of the Illinois Appellate Court was entered on January 21, 1969, and petition for re-hearing was denied by that court on March 5, 1969. A timely petition for leave to appeal was filed with the Supreme Court of Illinois and was by that court denied on May 26, 1969.

This petition is filed within 90 days of said denial.

Jurisdiction of this court is invoked under Title 28, U.S. Code, Section 125 (3), and Rule 22(1) of the rules of this court.

QUESTION PRESENTED

Is not a State conviction which is predicated on a total absence of evidence a violation of due process of law in accordance with the Fourteenth Amendment to the Constitution?

STATEMENT OF FACTS

Petitioner was charged in a one-count indictment with selling marijuana to a Miss Jeanne Clark for $24, and sentenced to ten years to ten years and a day. (The minimum sentence under the Illinois statute). People's Exhibit 4, pieces of tin foil, was introduced into evidence. Miss Clark, testified that the pieces of tin foil were like the tin foil she saw on March 4, 1966. (Tr. 91)[1] When

[1] "Tr." is the original Transcript of Proceedings as filed in this court.

the police officers saw People's Exhibit 4 on the night in question and put the crushed green plant in it, "There was only one piece of tin foil. There was not two." (Tr. 148-9). Another police officer, however, stated there were two pieces of tin foil in the exhibit. (Tr. 248-9). The chemist signed the exhibit.

A stipulation was introduced by the State's Attorney and counsel for defense that if a chemist were to testify she would state that Officer Divillo submitted a brown envelope to the crime laboratory on March 5, 1966, and that on March 7, 1966, she removed a tin foil packet from the envelope which contained a crushed green plant, tested the plant and determined it contained marijuana and that she then returned the tin foil packet with the crushed plant back into the envelope and that it was subsequently delivered to the Evidence Recovery Section. (Tr. 295-6).

REASON FOR GRANTING THE WRIT

The alleged marijuana which was introduced into evidence was never identified as the same as that which the State's witness allegedly received from the petitioner. The Fourteenth Amendment prevents conviction and deprivation of liberty by State courts without evidence. *Heikkinen* v. *United States,* 355 U.S. 273, 78 S.Ct. 299, 2 L.ed 2d 264; *Garner* v. *Louisiana,* 368 U.S. 157, 82 S.Ct. 248, 7 L.ed 2d 207; *Thompson* v. *City of Louisville,* 362 U.S. 199, 80 S.Ct. 624, 4 L.ed. 2d 654, 80 A.L.R.2d 1355.

Although this point was not raised when first appealed to the Illinois Appellate Court, on Petition for Rehearing, it was raised, as was the point raised in the Supreme Court of Illinois on Petition for Leave to Appeal. "The court may as a matter of grace, in a case involving deprivation of life or liberty, take notice of errors appearing upon the record which deprived the accused of substantial means of a fair and impartial trial, although no exceptions were taken or the question is imperfectly presented." *United Brotherhood of Carpenters* v. *United States,* 330 U.S. 395.

Accordingly, in this case, where there was no reference in the stipulation to State Exhibit 4 or to the tin foil and its contents which Miss Jeanne Clark said she received from the petitioner for $24, there is a total absence of evidence upon which to sustain the conviction. Although this court does not ordinarily entertain argument about the degree of insufficiency of evidence, if there is no evidence, this court will reverse. *Heikkinen* v. *United States, Supra; Garner* v. *Louisiana, Supra; Thompson* v. *City of Louisville, Supra.*

Although petition for leave to appeal was denied by the Supreme Court of Illinois in other marijuana cases, the

Supreme Court of Illinois has reversed for errors as in the case at bar. *People* v. *Judkins,* 28 Ill.2d 417, 192 N.E.2d 848, and *People* v. *Maurice,* 31 Ill.2d 456, 202 N.E.2d 480. In *People* v. *Brown,* 66 Ill.App.2d 317, 214 N.E. 2d 289, the Fourth Division of the Appellate Court of Illinois held that the stipulated testimony about the crime laboratory examination did not precisely identify the circumstances with the evidence introduced at trial. The Court stated (214 N.E.2d 290):

> "The evidence simply does not connect defendant with the crime alleged and fails to sustain the conviction which must, therefore, be reversed without remand."

(To be noted is that the decision in the instant case was filed by the Second Division of the Appellate Court of Illinois, there being four divisions of the First District of the Appellate Court of Illinois. Thus, conflicts within the Appellate Court were not resolved by the Supreme Court of Illinois, and accordingly, the instant petitioner was deprived of equal treatment of the law in accordance with the due process clause of the Fourteenth Amendment to the Constitution of the United States).

As there is no evidence whatsoever in the record to support this conviction, it is ". . . a violation of due process to convict and punish a man without evidence of his guilt." *Thompson* v. *Louisville,* 362 U.S. 199, 206.

CONCLUSION

For the above stated reason, the petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Attorney for Petitioner